

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MASON CHRISTMAS, a/k/a KENNETH
TERRELL WILLIAMS, a/k/a KENNETH
TERRELL BEARD,

Defendant-Appellant.

UNPUBLISHED

March 2, 2006

No. 258629

Wayne Circuit Court

LC No. 04-005854-01

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of 12 counts of felonious assault, MCL 750.82, and one count each of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, discharging a weapon at an occupied structure, MCL 750.234b, third-degree fleeing or eluding a police officer, MCL 257.602a(3)(a), and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. He was sentenced as a third-habitual offender, MCL 769.11, to concurrent prison terms of five to eight years for the felonious assault, carrying a concealed weapon, and discharging a weapon at an occupied structure convictions, and six years and four months to ten years for the felon in possession and third-degree fleeing or eluding convictions, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions stem from a dispute with patrons of a Detroit bar concerning who was entitled to play the next game of pool on the bar's billiard table. As a result of the dispute defendant was ejected from the bar, but returned a short while later with a firearm. After being denied reentry defendant fired several shots into the bar before leading police officers responding to the scene on a high-speed automobile chase.

On appeal, defendant argues that his convictions for both felonious assault and discharge of a weapon at an occupied structure violate the prohibition against double jeopardy. He argues that it was impossible to commit the offense of intentional discharge of a firearm at an occupied structure without also committing the offense of felonious assault. Defendant argues that one offense is necessarily included in the other and therefore, he could not be convicted of both. Generally, double jeopardy challenges present questions of law that are reviewed de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). However, because this double

jeopardy issue was not raised before the trial court, defendant must establish a plain error affecting his substantial rights in order to prevail. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

Both the United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 1, § 15, prohibit placing a defendant twice in jeopardy for a single offense. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). Double jeopardy protections prohibit multiple punishments for the *same* offense in order to protect a defendant from being sentenced to more punishment than the Legislature intended. *Id.* Legislative intent is the key factor in resolving whether two convictions involve the same offense for purposes of the double jeopardy prohibition against multiple punishments for the same offense. *Id.* at 629. Offenses are considered the *same* if each offense does not contain an element unique from the other. *Id.*, citing *People v Ford*, 262 Mich App 443, 448-449; 687 NW2d 119 (2004). In this case, the offenses are not the same.

“The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); see also MCL 750.82. The elements of intentional discharge of a firearm at an occupied structure include (1) intentional discharge of a firearm, (2) at a facility, (3) that the defendant knows or has reason to know is an occupied structure, and (4) reckless disregard for the safety of any individual. MCL 750.234b(2). Felonious assault, unlike intentional discharge of a firearm at an occupied structure, requires proof of an assault and proof of intent to injure or place another person in reasonable apprehension of an immediate battery. Intentional discharge of a firearm at an occupied structure, unlike felonious assault, requires proof that the defendant fired at a structure in reckless disregard of the safety of others. Contrary to defendant’s unsupported claim, it is possible to commit the offense of intentional discharge of a firearm at an occupied structure without committing a felonious assault. Where distinct statutory offenses require proof of different elements, a presumption arises that the Legislature intended multiple punishments for those offenses. *Meshell, supra*. This presumption can only be overcome by clear evidence that the Legislature did not intend multiple punishments. *Ford, supra* at 448.

In this case, defendant offers no evidence or argument to overcome the presumption that the Legislature intended multiple punishments for the distinct crimes of felonious assault and intentional discharge of a weapon at an occupied structure, but rather relies solely on his incorrect premise that the offenses are the “same” because a defendant necessarily commits a felonious assault when committing the crime of intentional discharge at an occupied structure. Defendant has, therefore, failed to meet his burden of demonstrating a plain error affecting his substantial rights. *Matuszak, supra*.

Defendant also raises numerous issues related to his sentencing. Defendant first argues that no substantial and compelling reasons existed to justify the trial court’s upward departure from the recommended minimum sentence range under the legislative guidelines. The guidelines minimum sentence range was 22 to 57 months, but defendant was sentenced to a minimum term of 60 months’ imprisonment for his convictions for felonious assault, carrying a concealed weapon, and discharge of a firearm at an occupied building, and he was sentenced to a minimum term of six years and four months’ imprisonment for his felon in possession of a firearm and third-degree fleeing or eluding convictions.

A trial court may depart from the sentencing guidelines minimum range where there are legitimate factors not considered by the guidelines, or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). A departure on these grounds is appropriate if “there are substantial and compelling reasons that lead a trial court to believe that a sentence within the guidelines ranges is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history” *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). A “substantial and compelling” reason is an objective and verifiable reason that keenly or irresistibly grabs our attention, is “of considerable worth” in deciding the length of the sentence, and exists only in exceptional cases. *Id.* at 257, 272.

[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court’s determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion. [*Id.* at 264-265 (citations and internal quotation marks omitted).]

Where a trial court articulates multiple “substantial and compelling” reasons for departure, this Court must determine whether the alternate reasons are substantial and compelling, and if some are not, it must determine whether the trial court would have departed and would have departed to the same degree on the basis of the substantial and compelling reasons alone. *Id.* at 260, 273.

In this case, the trial court departed upwardly from the sentencing guidelines range based on three factors. The first articulated factor was defendant’s conduct when fleeing and eluding the police officers in his automobile. Defendant engaged in a high-speed chase at night on rain-slick roads. He did not use his headlights or follow any traffic signals, and the chase ended only because defendant crashed his vehicle into a utility pole. The trial court found that the facts related to the high-speed chase were objective and verifiable, were not considered by the guidelines, and keenly and irresistibly grabbed its attention. We agree. At trial, police officers testified regarding defendant’s actions during the police chase. Additionally, defendant admitted that he fled from the police. He testified that he drove quickly, that it was raining, and that he did not observe traffic regulatory signs. He also admitted that he lost control of his vehicle and hit a utility pole. Defendant further testified that he knew he was being followed by the police, but fled because he did not want to be bothered by them. The facts of the chase, as articulated by the trial court, were clearly objective and verifiable on the record before us. Moreover, the sentencing guidelines did not take into account defendant’s actions in engaging in the chase. Further, the articulated factor keenly and irresistibly grabs our attention. Defendant’s acts demonstrated an utter disregard for the safety of the general public and the authority of the police. Because the guidelines, as scored, did not adequately account for defendant’s specific conduct when fleeing and eluding the police and because that factor was substantial and compelling, the trial court did not abuse its discretion in relying on it when departing from the recommended minimum sentence range under the guidelines.

In departing from the guidelines the trial court also relied on the articulated fact that at the time of the instant offenses, defendant was on probation for “virtually” the same crimes

charged in this case. Again, we find that this factor is objective and verifiable. Defendant's presentence investigation report indicates that in October 1999, defendant was charged with two counts of assault with intent to commit murder, one count of discharging a weapon at a building, one count of felony-firearm, and one count of felonious assault. Defendant pleaded nolo contendere to two of the charges and served two years' imprisonment. While he was on probation, he was charged with identical crimes, although his new charges were greater in number and included additional charges as well. The guidelines took into consideration that defendant had prior felony convictions and was on probation, MCL 777.52 and MCL 777.56, but did not take into account the similarity of facts underlying the prior and present situations. In other words, defendant's recidivism related to specific crimes was not considered by the guidelines. We agree with the trial court that this factor keenly and irresistibly grabs our attention. The trial court did not abuse its discretion in relying on that factor to upwardly depart from the minimum sentence range under the guidelines.

Finally, the trial court articulated as a substantial and compelling reason for its upward departure the nature of defendant's reckless, dangerous, and calculating behavior with respect to the crimes he committed on May 21, 2004. Defendant was angry over playing a pool game, so he assaulted other customers in the bar and threatened people's lives. After he left the scene, he returned and tried to enter the building with a loaded weapon. When he could not, he fired bullets into the front of the building and later shot at the back of the building, endangering an off-duty police officer. He then parked his vehicle near the bar and lay in wait for patrons to exit.¹ The sentencing guidelines did not take into account defendant's death threats, his reckless, calculated, and persistent conduct, or his plan to lay in wait for the patrons. On this record, including defendant's own admissions at trial, the facts stressed by the trial court were objective and verifiable, they were not adequately considered by the guidelines, and they keenly and irresistibly grab our attention.

Given defendant's conduct, we agree that this is one of the exceptional cases where an upward departure from the minimum sentence range was appropriate. *Babcock, supra* at 257, 272. We therefore affirm the trial court's conclusion that substantial and compelling reasons existed for an upward departure.

Defendant also argues, however, that his sentences are not proportionate. When a trial court departs from the sentencing guidelines, the departure is assessed by reference to the principle of proportionality. *Id.* at 262. The principle of proportionality provides that a sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). "[P]unishment should be made to fit the crime and the criminal." *Babcock, supra*. In this case, the highest departures from the minimum sentence range of 22 to 57 months were the sentences of six years

¹ When defendant testified at trial, he denied that he was the shooter. He claimed that he drove his brother-in-law back to the bar with a loaded weapon and that his brother-in-law was the shooter. Defendant, however, admitted that he had a plan to lay in wait outside the bar so that he could "catch" one of the exiting customers and fight him one-on-one. He was angry about his earlier problem at the bar and wanted to "settle" the matter.

and four months for third-degree fleeing or eluding and carrying a concealed weapon. These upward departures represent only a 19-month increase in defendant's minimum sentences. We conclude that the sentences do not fall outside the principled range of outcomes under the circumstances presented, *Babcock*, *supra* at 269, 274, and they are proportionate to the seriousness of the offense and the offender, *Milbourn*, *supra*. Defendant, who was on probation for similar crimes and was angry over a game of pool, repeatedly fired a weapon into a building that was occupied by many people, including off-duty law enforcement officials. He caused injuries, and nearly missed hitting several people with bullets. He then parked nearby, waiting for victims. He planned to "catch" a victim alone and settle his dispute in a violent manner. When approached by the police, he demonstrated his complete contempt and disregard for the law. He chose to endanger the general public by recklessly and dangerously driving in an attempt to evade law enforcement.

Defendant also argues that the trial court violated his constitutional rights at sentencing by relying on factors that were neither determined beyond a reasonable doubt by a jury nor admitted by himself. Specifically, defendant argues that the trial court's judicial fact-finding violated the rules of law articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Court indicated that *Blakely* is inapplicable to Michigan's sentencing system. We are bound by that decision. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004); see also *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005).²

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Donald S. Owens

² Because we find no cause to remand for resentencing, it is unnecessary to address defendant's argument that he is entitled to resentencing before a different judge.